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U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, on
its own behalf and as trustee
on behalf of the Lummi Nation,

Plaintiff,

v.

KEITH E. MILNER and SHIRLEY A.
MILNER, et al.,

Defendants.

THE LUMMI NATION,

Intervenor-Plaintiff.

NO. C01-809R

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO EXCLUDE TESTIMONY,
LIMIT DISCOVERY, AND STRIKE
DEFENSES

THIS MATTER comes before the court on the United States' and
Lummi Nation's motion to exclude testimony, limit discovery, and
strike affirmative defenses. Having reviewed the papers filed in
support of and in opposition to this motion, the court finds and
rules as follows:

I. BACKGROUND

This case is about rockeries and bulkheads that are alleged
to trespass onto tidelands on Sandy Point, Washington to which
the United States claims it holds title in trust for the Lummi

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1 Indian Nation.¹ In answering the complaints, Defendants Keith E.
2 and Shirley A. Milner, Mary D. Sharp, Brent C. and Mary K.
3 Nicholson, Harry F. Case, Ian C. and Marcia A. Boyd, and Donald
4 C. and Gloria Walker (hereinafter "the Milners") collectively
5 raise an affirmative defense denying that either the United
6 States or Lummi Nation hold title to the property in dispute. As
7 part of their defense, the Milners plan to offer the testimony of
8 Jeffrey Layton, whose proposed testimony is that the changes in
9 the tide lines fronting the Milners' properties have been caused
10 by the construction of two deep-water piers to the north of the
11 Milners' properties. The Milners have also propounded discovery
12 seeking documents from the United States and Lummi Nation related
13 to the construction, improvement, or maintenance of the two deep-
14 water piers.

15 In response, the United States and Lummi Nation have moved
16 the court to strike the Milners' affirmative defense, exclude
17 Layton's testimony, and relieve them from the responsibility of
18 responding to the Milners' discovery requests.

19 20 II. DISCUSSION

21 A. Motion to strike affirmative defense

22 Under FRCP Rule 12(f), a court acting on its own initiative
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24 ¹ In addition to trespass, the complaints also allege
25 violations of Section 10 of the Rivers and Harbors Act, 33 U.S.C.
26 § 403 and Section 301 of the Clean Water Act, 33 U.S.C.
§ 1311(a).

1 may strike an insufficient defense at any time. U.S. v. Iron
 2 Mountain Mines, Inc., 812 F. Supp. 1528, 1535 (E.D. Cal. 1992)
 3 (citing 5A C. Wright and A. Miller, Federal Practice and Proce-
 4 dure § 13080 (2d ed. 1990)). The court will consider Plaintiffs'
 5 motion even though the motion is untimely.² Id. Such a motion
 6 to strike is granted only if the affirmative defense is insuffi-
 7 cient as a matter of law. Id. (citing Memorex Corp. v. Int'l
 8 Bus. Mach. Corp., 555 F.2d 1379 (9th Cir. 1977)).

9 *1. Tidelands are held in trust*

10 Plaintiffs argue that they maintain title to the tidelands
 11 in question. By treaty and executive order in 1855 and 1873, the
 12 United States reserved to the Lummi Nation land on Sandy Point to
 13 the low-water mark. Treaty of Point Elliott, 12 Stat. 927 (Jan.
 14 22, 1855); Executive Order (Nov. 22, 1873), reprinted in 1
 15 Kappler, Laws and Treaties 917 (Gov't Printing Office 1904).
 16 Under the doctrine first announced in Pollard's Lessee v. Hunter,
 17 44 U.S. 212 (1845), such an express reservation precludes title
 18 in the tidelands in any other entity. Shively v. Bowlby, 152
 19 U.S. 1, 58 (1894) (states take title to submerged and tidal lands
 20 upon statehood subject to any express reservation by the United
 21 States or any prior grant of those lands). As Washington gained
 22 statehood in 1889, the land down to the low-water mark is held in
 23 trust by the United States on behalf of the Lummi Nation. Id.

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 25
 26 ² A motion to strike must be filed within 20 days of the
 service of an answer.

1 2. *Dispute of fact regarding boundaries*

2 The Milners succeed to properties that were patented from
3 the Lummi Reservation. These properties are bounded by the
4 beach. The land along the beach, however, has not remained
5 static. In the present case, a substantial amount of beachfront
6 fronting the Milners' properties has been lost since 1962.³
7 Through erosion, accretion, and avulsion,⁴ the low- and high-
8 water marks have changed over time. If the change is slow and
9 imperceptible, as by erosion or accretion, the boundary lines
10 shift. Parker v. Farrell, 74 Wash. 2d 553, 554-55 (1968). If,
11 on the other hand, the change is avulsive, the original boundary
12 lines remain. Id. at 555.

13 Plaintiffs contend that the change in the shoreline is due
14 to erosion and that the property lines have accordingly shifted
15 landward, leaving the Milners' rockeries and bulkheads on Lummi
16 land. The Milners, on the other hand, allege that the changes
17 were avulsive and that property lines have not changed so that
18 the rockeries and bulkheads are still located on their land.

19 Without further proof of the nature of the change in the
20 shoreline fronting the Milners' properties, it cannot be deter-
21 mined as a matter of law whether the rockeries and bulkheads are
22 located on the Milners' property. This dispute of fact makes
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24 ³ For example, on the Walker lot, the mean high water mark
25 has moved landward 92 feet. Ex. 1, Stephens Decl. at 5.

26 ⁴ Avulsion is the sudden and rapid change in a shoreline.
Parker v. Farrell, 74 Wash. 2d 553, 555 n.1 (1968).

1 striking the affirmative defense inappropriate.

2 B. Motion to exclude Layton's testimony

3 Under FRE 401, only relevant evidence is admissible. Under
4 that rule, relevant evidence means "evidence having any tendency
5 to make the existence of any fact that is of consequence to the
6 determination of the action more probable or less probable than
7 it would be without the evidence." FED. R. EVID. 401.

8 In the present case, the moving parties have sued for
9 trespass. Under Washington law, a person trespasses "when he or
10 she 'intentionally . . . remains on the land or . . . fails to
11 remove from the land a thing which he is under a duty to re-
12 move.'" Kaech v. Lewis County Pub. Util. Dist. No. 1, 106 Wash.
13 App. 260, 281 (quoting Bradley v. Am. Smelting & Refining Co.,
14 104 Wash. 2d 677, 681-82 (1985)). Consequently, Layton's testi-
15 mony about the cause of the loss of beachfront that allegedly
16 resulted in the Milners' structures being outside their property
17 lines is irrelevant as it does not establish whether the Milners'
18 are in fact trespassing. Moreover, the cause of the beachfront
19 loss is also irrelevant to a determination of whether that loss
20 resulted from erosion or an avulsion as the determining factors
21 are the speed and rapidity of the change, not whether the change
22 was manmade or natural. Compare In re Point Lookout, 144
23 N.Y.S.2d 440 (1954) (loss of 30 feet of beach due to seawall is
24 avulsive), with, City of New York v. Realty Assoc., 256 N.Y. 217
25 (1931) (storms washing away beach are avulsive). Nor is the
26 cause of the beachfront loss relevant to the amount of damages

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1 arising from the trespass. Simply put, evidence about the cause
2 of the erosion has no tendency to make any fact that is of
3 consequence to the determination of the action more or less
4 likely.

5 At this stage, Defendants' have failed to demonstrate the
6 relevance of Layton's testimony. Accordingly, the testimony is
7 excluded. Should the testimony become relevant at some future
8 point, Defendants' can seek the court's permission to admit the
9 testimony.

10 C. Motion to limit discovery

11 FRCP Rule 26(c) allows a party to move for a protective
12 order that discovery not be had where justice requires that the
13 party be protected from "annoyance, embarrassment, oppression, or
14 undue burden or expense." FED. R. CIV. P. 26(c). Though not
15 styled as such, the court interprets the moving parties' motion
16 to limit discovery as a motion for a protective order.

17 Having reviewed the declaration of Brian Kipnis, the court
18 finds that the parties have not adequately conferred as required
19 by FRCP 26(c). The court, therefore, orders that the parties
20 meet and confer to determine whether production of the adminis-
21 trative record accompanying any permitting decisions for the two
22 piers is sufficient or whether the parties can agree on other
23 limitations that will resolve this dispute.

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III. CONCLUSION

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For the foregoing reasons, the United States' and Lummi

ORDER

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1 Nation's motion [docket no. 92-1] is GRANTED in part and DENIED
2 in part. It is hereby ORDERED that

3 1. Jeffrey Layton's proposed testimony be excluded;

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5 2. the parties should meet and confer regarding the Milners'
6 requests for production number 3 and 4 in Defendants' second
7 set of requests for production; and.

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9 3. the parties should contact Elizabeth Tyree at (206) 553-2996
10 to set a status conference regarding possibly bifurcating
11 the case to handle the boundary dispute separate from any
12 issue of damages.

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14 DATED at Seattle, Washington this 26th day of November,
15 2002.

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17 
18 BARBARA JACOBS ROTHSTEIN
19 UNITED STATES DISTRICT JUDGE
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